Supreme Court, U.S.
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Nos. 91-1892, 92-25

In The

Supreme Court of the United States

October Term, 1992

PETER RUBEN,

Petitioner,

vs.

HOME PORT RENTALS, INC.,

Respondent.

DENNY ALLEN,

Petitioner,

vs.

HOME PORT RENTALS, INC.,

Respondent.

Petitions for Writs of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the finding by the District Court that it had personal jurisdiction of Peter Ruben and Denny Allen thereby denying them due process of law?

2. Did the Court of Appeals err in affirming the refusal of the District Court to vacate the default judgment under Rule 60(b) Fed.R.Civ.P. entered against Peter Ruben and Denny Allen and in not finding that its failure to do so was an abuse of discretion?

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STATEMENT OF THE CASE

In August, 1986, Home Port Rentals, Inc. ("Home Port" or "Plaintiff"), filed a lawsuit against International Yachting Group, Inc. ("IYG" or "Defendant"), Peter Ruben ("Mr. Ruben" or "Defendant"), Denny Allen ("Mr. Allen" or "Defendant"), Roger Moore, and Jim Edwards alleging breach of contract, common law fraud, and violation of the South Carolina securities laws arising out of the sale of three (3) motor boat franchises and three (3) boat lease agreements between Home Port and IYG. (App., pp. 42-51). Mr. Ruben was IYG's chairman of the board and Mr. Allen its president. (App. p. 3). Mikell Harper, Esquire ("Mr. Harper"), timely filed an Answer and Counterclaim on behalf of all the Defendants. On October 30, 1986, Mr. Harper filed a First Amended Answer and Counterclaim, as well as a Motion to Dismiss and Supporting Memorandum.

On November 4, 1987, by consent of counsel for all parties, the Honorable Falcon B. Hawkins, United States District Judge for the District of South Carolina, signed a Consent Order granting the Plaintiff a voluntary non-suit without prejudice, stipulating in part timely reinstitution of the Plaintiff's claims would subject the Defendants to the court's jurisdiction and Mr. Harper would be authorized as the Defendants' agent in South Carolina to accept service of process. The Consent Order was dated November 4, 1987, filed on November 13, 1987, and entered on November 17, 1987. (App., p. 39). In accordance with the Consent Order, Home Port reinstituted suit against the same Defendants, including Mr. Ruben and Mr. Allen, on May 4, 1988, through service of the Summons and Complaint upon Mr. Harper. (App., p. 58). On May 26, 1988,

Mr. Harper again filed an Answer, Counterclaim, and Motion to Dismiss on behalf of the Defendants in response to the Plaintiff's pleadings. (App., pp. 4, 21, 60).

Due to the Defendants' uncooperative behavior, Mr. Harper filed a motion to withdraw as counsel on August 2, 1988. (App., p. 62). On August 25, 1988, Judge Hawkins held a hearing on Mr. Harper's motion to withdraw; and he issued a Rule to Show Cause and Order to all Defendants on September 23, 1988. The rule to show cause hearing was held on October 26, 1988. (App., p. 81). Following the hearing, Judge Hawkins issued an order relieving Mr. Harper as Defendants' counsel. (App., p. 86). Subsequently, on October 31, 1988, Judge Hawkins issued an order striking the Defendants' responsive pleadings with prejudice and holding them in default for failure to cooperate in discovery matters. (App., p. 86).

On March 17, 1989, after taking testimony on the matter, Judge Hawkins issued an order awarding the Plaintiff One Million Two Hundred Thousand Dollars ($1,200,000) actual damages and Fifty Thousand Dollars ($50,000) punitive damages against all Defendants. (App., p. 97). Judgment was entered on March 20, 1989; and Defendant Ruben personally received a copy of the default judgment from the court on April 1, 1989. (App., p. 136).

On May 13, 1989, Mr. Ruben entered into a retainer agreement with Randall Chastain, Esquire ("Chastain"), his second South Carolina attorney. (App., p. 100). Mr. Chastain was to represent Mr. Ruben in seeking to have the default judgment set aside. Approximately eleven (11) months later, on March 14, 1990, Mr. Chastain filed a

motion to vacate the default judgment pursuant to rule 60(b) of the Federal Rules of Civil Procedure. (App., p. 136). On July 18, 1990, Judge Hawkins entered an order denying Mr. Ruben's motion to vacate the default judgment, citing neglect and dilatory behavior. (App., pp. 24-25).

On August 15, 1990, Mr. Chastain filed a motion to reconsider the denial of the motion to vacate. (App., p. 27). In September, 1990, Mr. Ruben retained T. English McCutheon, III, Esquire, and Ronald James Tryon, Esquire, as his third and fourth South Carolina counsel. On November 27, 1990, more than one (1) year after its entry, Mr. Allen also filed a companion motion pursuant to Rule 60(b)(6) to vacate the default judgment against him. (App., p. 27). On May 2, 1991, following a hearing on the matter and review of the pleadings and documents before him, Judge Hawkins entered an order denying Mr. Ruben's motion to reconsider and Mr. Allen's motion to vacate. (App., pp. 27-31).

Mr. Ruben and Mr. Allen timely filed notices of appeal from Judge Hawkins' orders entered on April 30, 1991. On June 11, 1991, the United States Court of Appeals for the Fourth Circuit consolidated these cases for review. In an opinion dated February 25, 1992, the Fourth Circuit affirmed the trial court. A Petition for Rehearing in the appellate court was denied on March 23, 1992.

The plaintiff here diligently and correctly pursued its lawsuit against Mr. Ruben and Mr. Allen throughout the long and tortured history of this matter. On the other hand, Mr. Ruben and Mr. Allen were uncooperative

towards the Plaintiff, the district court, and Mr. Harper throughout the proceedings, thereby making the task of their chosen counsel difficult, if not impossible. The Plaintiff was awarded a substantial default judgment, which judgment Mr. Ruben and Mr. Allen attack as being the result of "blatant lawyer negligence." Mr. Ruben and Mr. Allen should not be allowed to chronically shift the blame for their dilatory or inattentive behavior upon their several attorneys in a last ditch effort to avoid financial responsibility owed to the Plaintiff for their misconduct. Moreover, the Plaintiff, who pursued its lawsuit diligently and complied with each and every order of the court, should not be stripped of its default judgment.

On August 13, 1986, Home Port filed suit in the District Court for the District of South Carolina against IYG, Mr. Ruben, Mr. Allen, and two of IYG's employees, Roger Moore and Jim Edwards. The summons and Complaint were served by certified mail on all defendants at IYG's corporate address, 302 Lewis Lane, Dania, Florida 33304 (App., pp. 34, 35). There was evidently no difficulty with acceptance of service of process at that time. Mr. Allen, who was president of IYG, traveled to Beaufort, South Carolina, to discuss the lawsuit with Mikell Harper, Esquire. Mr. Allen paid Mr. Harper a retainer and entered into an agreement with him on behalf of all the Defendants. Mr. Allen thereafter acted as the spokesman for all the Defendants in their joint representation by Mr. Harper. (App., pp. 28, 29, 102).

IYG had sold its assets to Adventurent, Inc., in March, 1986. (App., pp. 29, 125). Adventurent, as the successor corporation to IYG, had as its stockholders both Mr. Ruben and Mr. Allen. (App., p. 13). Adventurent and

IYG operated from the same Florida address through December, 1986, when Adventurent moved to Ft. Lauderdale, Florida. (App., p. 133).

During late 1987, Home Port's counsel and Mr. Harper on behalf of the Defendants agreed to dismiss the lawsuit without prejudice premised upon certain conditions proffered by the Plaintiff. This agreement arose partially due to Mr. Harper's difficulty attaining cooperation from the Defendants to participate in the trial. As an accommodation to Mr. Harper and his clients, as well as in response to his motion to dismiss, the parties agreed upon a voluntary non-suit without prejudice. On October 29, 1987, Home Port's counsel drafted a proposed Consent Order and sent it to Mr. Harper by letter dated October 29, 1987. (App., p. 36). The Consent Order provided that in the event Plaintiff reinstituted its lawsuit within "180 days" the Defendants would voluntarily submit themselves to the jurisdiction of the court and waive any statute of limitations defense. Moreover, the Order provided Mr. Harper would accept service of process for all Defendants, including Mr. Ruben and Mr. Allen, provided that the proceedings were commenced within the 180 day time limit. (App., p. 39).

By letter dated November 3, 1987, Mr. Harper advised Mr. Allen of the voluntary dismissal of the Home Port lawsuit. The letter to Mr. Allen reflects that there was an enclosure with the letter; and Mr. Harper represented to the court that he forwarded a copy of the Consent Order to the Defendants. (App., p. 4). In his capacity as spokesman for the Defendants, Mr. Allen contacted Mr. Ruben to inform him of the contents of Mr. Harper's November 3, 1987, letter. (App., p. 134). In

addition, the November 3, 1987, letter mailed to Mr. Allen at IYG's corporate address was forwarded to him by Jan Gibson, the receptionist for Adventurent. (App., pp. 28, 29, 125). Mr. Allen had apparently moved to Keller, Texas, without informing his attorney that he had done so.

Although the November 3, 1987, letter received by both Mr. Ruben and Mr. Allen was sent by Mr. Harper to what the Defendants contend is an improper address, neither "cooperative" Defendant corrected Mr. Harper's glaring error. Moreover, the letter, which discusses the dismissal and notes an enclosure, states "I do not expect that (refiling and reservicing) to happen, I will let you know and keep you posted on developments." (App., p. 37). Unless Mr. Harper was knowingly authorized to accept process on behalf of the Defendants in accordance with the Consent Order, about what would he know upon which to keep them posted? Common sense and logic dictate the conclusion the Defendants, including Mr. Ruben and Mr.. Allen, authorized the agency arrangement, failed to notify Mr. Harper as their agent of the relocation, received the mail at the Florida address which they wanted to receive, and hoped their "unavailability" would discourage the Plaintiff and shield them from execution upon any potential judgment.

On May 4, 1988, well within 180 days of the effective date of the consent Order, Home Port reinstituted suit against the Defendants. (App., p. 58). Pursuant to the terms of the Consent Order, Mr.. Harper accepted service of process for all Defendants. (App., pp. 58, 63).

On May 25, 1988, Mr. Harper sent a registered letter to Mr. Allen at the corporate headquarters for IYG,

enclosing copies of the Complaint, the Answer and Counterclaim, the Motion to Dismiss, and the Supporting Memorandum. (App., pp. 60, 69). Mr. Harper asked that Mr. Allen call him "immediately" and provide him with Mr. Allen's new address and telephone number. (App., p. 60). Although sent to the same address effective six (6) months earlier, this letter was returned to Mr. Harper with a notation that Mr. Allen was no longer at that address and his whereabouts were unknown. (App., p. 68).

Mr. Harper, through his secretary, tried to contact the Defendants at their prior business address in Ft. Lauderdale, Florida, which was then being operated by Adventurent. Mr. Harper received no assistance from the persons with whom his secretary spoke and found them to be "generally uncooperative." (App., pp. 4, 29). The May 25, 1988, registered letter was sent to the same address as the November 3, 1987, letter, in which Mr. Harper notified Mr. Allen of the dismissal of the first lawsuit. There is no question that Mr. Allen received the November 3, 1987, letter; but for some reason, the May 25, 1988, certified letter sent to him at the same address, the same as IYG's successor corporation, Adventurent, was returned to him unopened. Mr. Allen chose not to inform Mr. Harper of his relocation; and no one at Mr. Allen's business was willing to tell him any correct address.

On August 2, 1988, Mr. Harper filed a motion to withdraw as counsel for the defendants. (App., p. 24). In the memorandum in support of his motion to withdraw, Mr. Harper stated that the whereabouts of the Defendants were unknown to him and he had made an "exhaustive

and diligent search for them." (App., p. 24). Mr. Harper had, in fact, tried to contact his clients by certified mail, telephone communications, and through contacting another attorney who was representing Adventurent, the successor business to IYG in which the Defendants were principals. In fact, Mr. Harper had discussed the specific terms of the Consent Order with Mr. Allen, the spokesman for all the defendants; and there is no evidence Mr. Allen objected to any of the terms of the Consent Order. Moreover, after the Consent Order was entered, a copy of the Order was sent to Mr. Allen through regular, uncertified mail with an accompanying letter, the contents of which were discussed with Mr. Ruben; and the letter was never returned undelivered to Mr. Allen. (App., pp. 67-68). The defendants received the mail which they wanted to receive.

The issue of the unavailability of Mr. Harper's clients was fully aired before Judge Hawkins on August 25, 1988. (App., p. 65). Mr. Harper informed the court that the Consent Order had been mailed to the Defendants; and the mailing containing the Consent Order had not been returned. (App., pp. 67-68). The Defendants were certainly aware of the prospects of a new proceedings; and Mr. Harper made numerous and diligent attempts to inform them of the actuality of that proceedings.

On September 23, 1988, the court filed its Rule to Show Cause as to why a default judgment should not be entered against the Defendants. (App., p. 79). The Rule was served by the court through registered mail on each of the Defendants as their last known address. (App., p. 82). As insurance, Judge Hawkins directed Home Port's counsel to publish the court's Rule and Order in a local

newspaper of general circulation in Florida at the defendants' last known address. On October 4, 1988, Home Port's counsel had the Rule and Order published in a Broward County, Florida, weekly newspaper called "The Sun-Tattler." (App., pp. 82, 87). The publication was done in addition to the certified mailing by the court; and notice through publication was not the sole method the Plaintiff or court attempted to apprise the Defendants of the Rule and order. From the poor quality of copies in the record one cannot decisively tell whether attempted service by the court upon the Defendants was successful noticing the October 25, 1988, hearing. However, more important, in focusing the issue of the Defendants' credibility in contending certified mailings were not *intentionally* evaded, is the clarity of the addresses incorporated by the Court. Did the same address work sometimes while not at others; and, if not, why? The Court of Appeals agreed with the district court findings that Mr. Ruben intentionally evaded contacts from the court and Mr. Harper.

The rule to Show Cause hearing was held on October 24, 1988; and neither Mr. Harper nor any of the Defendants was present. (App., pp. 5, 81). On October 26, 1988, Judge Hawkins issued his Order relieving Mr. Harper as counsel for the Defendants. (App., p. 5). The court instructed Home Port's counsel to submit a proposed default order. (App., p. 84).

On October 31, 1988, Judge Hawkins issued an order holding the Defendants, including Mr. Ruben and Mr. Allen, in default for failing to participate in discovery, refusing to submit to depositions, and failing to participate in the prosecution and defense of the lawsuit. (App.,

pp. 5, 86). Judge Hawkins also struck the Defendants' counterclaim with prejudice and held the Defendants jointly and severally liable for actual and punitive damages. (App., pp. 87).

On March 1, 1989, a hearing on the default judgment was held at which counsel for Home Port and representatives of Home Port were present. Mr. McEachern testified that Home Port had suffered actual damages in the amount of $381,483.47 as a result of the Defendants' breach of contract. (App., p. 91). Mr. McEachern further testified about Home Port's damages as a result of the fraudulent misrepresentations made to it by the Defendants concerning the franchise agreements. Mr. McEachern testified that the Defendants had represented that Home Port could expect in excess of $20,000 a month in profits during the initial five-year life of the franchise agreement and through the three five-year renewal options. Based upon the specific representations of the Defendants, Mr. McEachern calculated Home Port lost profits in the amount of $1,200,000. (App., pp. 92-93). Mr. McEachern further testified that Home Port had been advised that the Club Nautico investment concept was tried and proven with many other investors, none of whom had ever lost money "even for so much as a month." It was an appealing investment to Home Port because the company was involved in boat rentals. As a result of the false representations made to Home Port inducing the investment, Mr. McEachern stated Home Port lost $381,000. (App., p. 93). On March 16, 1989, Judge Hawkins issued an Order awarding the plaintiff $1,200,000 in actual damages and $50,000 in punitive damages against all the Defendants. (App., pp. 97-99).

On March 23, 1989, the district court sent a copy of the Order of Judgment by registered mail to Mr. Ruben at the Lewis Lane, Dania, Florida, address. Interestingly, the letter was accepted on Mr. Ruben's behalf by Mr. Skoglund, husband of the former controller of IYG, who lived next door to the former offices of IYG in Dania, Florida. (App., p. 104). It is curious that Mr. Ruben has characterized the certified letter to him as "misdelivered" (App., p. 104) when no other certified letters sent to the Defendants were so misdelivered. Mr. Skoglund forwarded the letter to Mr. Ruben at his Mill Valley, California, address where it was received by Mr. Ruben on April 1, 1989. (App., pp. 5, 112).

On March 14, 1990, Mr. Chastain filed a motion to vacate the default judgment. (App., pp. 20, 108). Judge Hawkins heard this motion on July 10, 1990. The issues were extensively presented to Judge Hawkins orally and in written form; and, on July 17, 1990, Judge Hawkins denied Mr. Ruben's motion to vacate the default judgment. Mr. Ruben raised no issue about any miscalculation or improper distribution of damages amongst the Defendants. (App., pp. 20-26).

It is uncontradicted that Mr. Ruben received actual notice of the default judgment in early April, 1989, well within the appeal period. Notwithstanding this prompt notice of the default judgment, as well as his alleged concern with the quality of Mr. Harper's and Mr. Chastain's representation, a motion to vacate the default judgment was not filed until nearly one (1) year after entry. The court found this to show that Mr. Ruben did not act with due diligence. (App., p. 23).

On November 30, 1990, a hearing was held before Judge Hawkins on Mr. Allen's motion to vacate and Mr. Ruben's motion to reconsider. (App., p. 27). With execution upon a substantial judgment facing them, not only was Home Port's counsel present, but so too were counsel for Mr. Ruben and Mr. Allen. After hearing extensive arguments on the issues and considering the entire record, Judge Hawkins denied the motions. (App., pp. 27-31). Judge Hawkins exercised his discretion not to penalize the blameless Plaintiff for the sins of omission or commission of the Defendants and their attorneys. It was an appropriate allocation of fault and a proper exercise of Judge Hawkins' discretion in this matter; and the Court of Appeals appropriately affirmed the trial court rulings of Judge Hawkins.

SUMMARY OF ARGUMENT

The Supreme Court ought to deny the petitions of Mr. Ruben and Mr. Allen for the following reasons:

(1) Rule 10 of the Rules of the Supreme Court in relevant part states a "petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The decision of whether to vacate a default judgment rests with the sound judicial discretion of the district court. The well-reasoned, detailed opinion of the Fourth Circuit Court of Appeals affirmed the discretionary ruling based upon reasonable factual determinations of the district court as not constituting abuse of discretion. The decision of the appellate court affirming the district court does not "conflict with the decision of

another United States Court of Appeals on the same matter" and is consistent with "accepted and usual course of judicial proceedings." Accordingly, the discretionary ruling of the district court affirmed by the appellate court should stand; and the petitions ought to be denied.

(2) It is well-established that questions unraised in the lower courts should not be under consideration in proceedings on petitions on certiorari. *Ellis v. Dixon*, 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, *rehearing denied* 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759. However, significant portions of each petition assert damage miscalculations and errors of distribution of the judgment amount amongst the responsible parties by the district court. *See* Ruben Petition, Question 2, ¶B, pp. 28-30 and Allen Petition, Question 2, ¶A, pp. 23-26. The petitions ought not be the original source of these recently formed arguments not raised below at the trial or appellate court levels. Accordingly, this joint brief in opposition does not specifically address whatever substantive issues Mr. Ruben and Mr. Allen raise concerning the judgment amount or its intra-defendant distribution; and the petitions should be denied.

(3) The petitioners contend requisite due process requires actual personal service upon them as a fundamental prerequisite to entry of the default judgment in this matter. However, the district and appellate courts disagree with the petitioners' interpretations of due process.

The terms of the consent order premise dismissal of Home Port's original action upon the agreement of Mr.

Ruben and Mr. Allen to waive any objections to the court's assertion of personal jurisdiction upon them and to authorize F. Mikell Harper, Esquire, their attorney, to receive service of process on their behalf. The Court of Appeals states there is "ample support for the district court's finding that Harper was authorized to act on behalf of the defendants in entering into the consent agreement and accepting service on the defendants' behalf." Mr. Harper was the court-appointed agent of Mr. Ruben and Mr. Allen for the specific purpose of accepting service of process; and the due process interests of the petitioners were met in accordance with the specific dictates of their requirements in the consent order. Accordingly, the petitions should be denied.

(4) Mr. Ruben and Mr. Allen in the alternative complain any waiver of defenses included within their consent agreement was ineffective because Home Port failed to reinstitute the lawsuit "no later than 180 days from the date" of the consent order. The petitioners contend the reinstitution of the lawsuit occurred more than 180 days from November 4, 1987, the date on which the court signed the consent order. The district court found that "the relevant date for computation of time is the date the order was filed in the Clerk of Court's Office, November 13, 1987." Under the district court's interpretation of the consent order, Home Port refiled its action 172 days after the consent order was filed; and the refiling was timely.

It is peculiarly within the province of the district court to determine the meaning of its own order. *Kendrick v. Peteres*, 931 F.2d 421 (6th Cir. 1991). The district court did not abuse its discretion in interpreting its own order. Accordingly, the petitions should be denied.

(5) Mr. Ruben and Mr. Allen contend the Court of Appeals erred in affirming the district court did not abuse its discretion refusing to vacate the judgment rendered against them. Mr. Ruben and Mr. Allen waited a few weeks less than a year and approximately twenty (20) months, respectively, following actual notice of the judgment rendered against them, before filing motions to vacate the judgment. The petitions rely upon Rule 60(b) for relief asserting the district court abused its discretion refusing to vacate the judgment. However, Rule 60(b) requires substantially more effort and good faith than exerted by Mr. Ruben and Mr. Allen. The Court of Appeals affirmed the district court finding that "Ruben purposely did not inform the district court of his whereabouts for the ulterior motive[ ] of avoiding process" and he "apparently did receive correspondence when he wished."

Mr. Allen moved for relief from the default judgment on the same facts underlying Mr. Ruben's Rule 60(b)(1) motion. However, given the lapse of more than one (1) year, Mr. Allen couched his plea for relief upon Rule 60(b)(6). The Court of Appeals affirmed the district court's denial of Mr. Allen's motion for the same reason it denied Mr. Ruben's motion.

> It is apparent from the fact that Allen relies upon the same evidence and the same arguments that Ruben relies upon that Allen's Rule 60(b)(6) motion is merely an attempt to circumvent the time limitations under Rule 60(b)(1). A litigant may not move for relief under Rule 60(b)(6) in order to circumvent the applicable time limits on motions under subsections of Rule 60(b).

Accordingly, the petitions of Mr. Ruben and Mr. Allen relying upon the requirements of Rule 60(b) should be denied.

ARGUMENT

I. THE DISTRICT COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANTS AND THUS THE JUDGMENT ENTERED AGAINST THEM WAS VALID; AND THE COURT OF APPEALS ACTED APPROPRIATELY AFFIRMING THE DISTRICT COURT REFUSAL TO VACATE THE DEFAULT JUDGMENT PURSUANT TO RULE 60(b)(4).

A. Defendants' counsel was authorized to accept service of process.

In relevant part, the Consent Order provided that Defendants' counsel, Mr. Harper, "would accept service of process on behalf of the above-named Defendants [IYG and Messrs. Ruben, Allen, Moore and Edwards] for legal proceedings instituted by the Plaintiff, provided that, such proceedings are commenced by the Plaintiff no later than 180 days from the date of this Order." (App., p. 39). As previously discussed, *supra*, the second lawsuit as plainly evidenced and anticipated in the parties' agreement was properly commenced within 180 days from the effective date of the Consent Order.

When the first lawsuit was filed, Mr. Harper was approached by Mr. Allen concerning representation of all the Defendants. Mr. Harper agreed to represent all the Defendants; and Mr. Allen apparently was appointed by the Defendants as the "contact" between Mr. Harper and

the other Defendants. (App., pp. 28, 29, 102). Accordingly, for Mr. Ruben to claim he was never represented by Mr. Harper plainly does not square with the record.

In the November 3, 1987, letter, Mr. Harper advised Mr. Allen that the initial lawsuit against all Defendants had been dismissed, but the Plaintiff had the right to reinstitute suit. (App. pp. 37, 38). Mr. Harper testified that a copy of the Consent Order was enclosed with the November 3, 1987, letter; and the letter does bear the notation "Enclosure." (App., pp. 37, 38). In his Affidavit of September 26, 1990, Mr. Allen stated that after receiving the November 3, 1987, letter, he "had a telephone conversation with Mr. Ruben and told him the contents of the letter." (App., p. 125). The copy of the proposed Consent Order, apparently enclosed with the November 3, 1987, letter and discussed by Mr. Allen and Mr. Ruben, should have given them ample notice and opportunity to protest any objectionable terms of the Consent Order.

The attorney and client relationship is one of principal and agent; and general agency rules are applicable to the relationship. *Ampex Credit Corp. v. Bateman,* 554 F.2d 750 (5th Cir. 1977). Thus, the omissions and commissions of an attorney are to be regarded as the acts of the client he or she represents. *Davis v. United Fruit Co.,* 402 F.2d 328 (2d Cir. 1968), *cert. denied,* 393 U.S. 1085 (1989). The client as principal is bound by the acts of his or her attorney agent acting within the scope of his or her actual, apparent or ostensible authority. *Prate v. Freedman,* 583 F.2d 42 (2d Cir. 1978). This rule applies with particular force where third parties have justifiably relied on the attorney's ostensible authority, *e.g., Phelps v. Kozakar,* 146 Cal. App. 3d 1078, 194 Cal. Rptr. 872 (Cal. Ct. App. 1983),

and springs from the concept that a client freely chooses his or her attorney and retains the right of dismissal throughout the relationship. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962).

The Consent Order specifically authorized service of the reinstituted lawsuit upon Mr. Harper. (App., p. 40). Service was accomplished by the Plaintiff in that fashion and in reliance upon the authority shown in the Consent Order. (App., p. 58). Mr. Harper answered and counterclaimed; and he also filed a motion to dismiss. (App., p. 4). Under similar circumstances, other courts have found acceptance of process by an attorney to be valid service on his or her client. *E.g., United States v. Bosurgi,* 343 F. Supp. 815 (S.D. N.Y. 1972); *Smith v. Spitzenberger,* 363 N.W.2d 470 (Minn. Ct. App. 1985); *Friedman v. Friedman,* 224 So. 2d 424 (Fla. Dist. Ct. App. 1969).

Mr. Ruben and Mr. Allen attempt to focus attention upon appropriateness of service upon them by publication of the Rule to Show Cause. Judge Hawkins stated: "In our attempts to serve Mr. Ruben and Mr. Allen with return receipts requested, they all returned back to the sender." (App., p. 82). Plaintiff's counsel noted: "In *addition* to the Court's attempt to give each Defendant notice, I *also* had published in the local newspaper in the same county as its business and the last address for the Defendants a notice." *Id.* (emphasis supplied). Under these circumstances, service by publication in a newspaper of general circulation in Broward County Florida, the last known address of each of the Defendants, was merely an additional method employed in the numerous attempts to reach the Defendants. In short, the facts reveal no infirmity in service upon Mr. Ruben and Mr. Allen.

Mr. Harper was authorized to accept service of the reinstituted lawsuit; and the Plaintiff was entitled to rely upon that apparent authority. When it became apparent the Defendants were being uncooperative with their attorney, the district court and Home Port's counsel exerted extra effort to notify Mr. Ruben and Mr. Allen of pending proceedings. Mr. Ruben and Mr. Allen claim no notice; the record speaks otherwise. The default judgment entered against Mr. Ruben and Mr. Allen was appropriate; and the district court and appellate court rulings were proper.

B. The lawsuit was reinstituted in a timely fashion.

Judge Hawkins signed a Consent Order on November 4, 1987; it was filed on November 13, 1987, and subsequently entered on November 17, 1987. (App., pp. 14, 25, 26). Home Port reinstituted its lawsuit on May 4, 1988; and personal service on the Defendants' counsel of record was accomplished on that date. (App., p. 58). The lawsuit was filed within the 180 day period provided for in the parties' Consent Order. (App., pp. 10-12).

Rule 58 provides in pertinent part that a "judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Entry occurs "only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court." *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683, 688 (4th Cir. 1978);

Fed. R. Civ. P. 58, 79(a). If there is doubt as to the operative date of a judgment, that doubt is to be resolved in favor of the longer period of time. *Phan v. Friedes*, 91 F.R.D. 408 (N.D.Ill.1981).

It is significant that Mr. Harper never made any representation to the court that the pleadings were not timely filed in accordance with the parties' agreement and Consent Order. In addition, the timeliness of the reinstituted lawsuit was never raised in the Defendants' responsive pleadings or during the August 25, 1988, hearing when Mr. Harper was seeking to be removed as Defendants' counsel. (App., pp. 65-78). By not challenging the timeliness of the refiled suit in those pleadings, the Defendants waived their rights to do so at a later date. Fed.R.Civ.P. 12(b)(6).

C. There was no violation of rights of Mr. Ruben and Mr. Allen to procedural due process.

Home Port does not seek to diminish in any way the procedural due process protections afforded Mr. Ruben and Mr. Allen. Home Port's position supports Judge Hawkin's numerous rulings that Mr. Ruben and Mr. Allen received adequate notification of the proceedings and either carelessly or in a calculated "hide and go seek" manner did not care to communicate with their lawyer or appear at the appropriate times for discovery, trial dates, or hearings. Perfect notice is not what the law requires. Rather, where non-personal service is employed, the question is whether the method employed is reasonably calculated to give notice to the party whose interests are to be affected by the suit or proceedings and to afford

him or her an adequate opportunity to be heard. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The practicalities in a given case are a factor in determining whether the constitutional requirements have been satisfied. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

Home Port served the second lawsuit upon the counsel of Mr. Ruben and Mr. Allen pursuant to the terms of the Consent Order. Such service was reasonably calculated to give them notice of the action. Service of Process in accordance with the parties' agreement upon the actual or apparent agent of Mr. Ruben and Mr. Allen should not be deemed defective, for to do so would rob consent orders of their certainty and afford defaulting Defendants to cast blame upon their attorney in defense of an unwanted outcome or as a result of being found. Consent orders would have little or no value if the terms upon which the parties had agreed could not be trusted.

After receiving the second pleadings, Mr. Harper forwarded them to the Defendants by registered mail at the address given to him. (App., p. 68). The pleadings were returned to Mr. Harper with a notation the Defendants were no longer at the address provided to him and their whereabouts were unknown. *Id.* Mr. Harper sent the pleadings to Adventurent, IYG's successor corporation in which Mr. Ruben and Mr. Allen were principal stockholders. (App., pp. 68-69). In addition, Mr. Harper's secretary attempted to contact Mr. Ruben and Mr. Allen at their former business address in Florida, which was then being operated by Adventurent. However, the persons she spoke with were "generally uncooperative" and would not assist her in locating Mr. Harper's clients. (App., pp. 4, 29).

Although Mr. Allen was the person in charge of the litigation for the defendants, he either was careless or deceptive in not giving his new Texas address to Mr. Harper. *Id.* After Mr. Allen moved to Texas in March 1987, Jan Gibson, an employee of both IYG and Adventurent, supposedly forwarded all business mail to Mr. Allen in Texas. (App.; pp. 28, 29). Moreover, the same forwarding policy allegedly applied to Mr. Ruben as well. *Id.* Mr. Allen and Mr. Ruben were stockholders of Adventurent. It strains credulity, given Ms. Gibson's familiarity with the whereabouts of Mr. Allen and Mr. Ruben, to believe that they were not made aware of all correspondence from their attorneys or federal court, particularly registered mail. Significantly, Mr. Harper's November 3, 1987, letter did reach Mr. Allen; and he discussed its contents with Mr. Ruben. (App., p. 125). Despite actual knowledge that the lawsuit could be reinstituted, Mr. Allen and Mr. Ruben both moved to new addresses and failed to advise Mr. Harper of the relocation. As the district court noted in its Order affirmed by the appellate court, this defies common sense. It also suggest "ulterior motives." (App., p. 136).

It has long been held that with respect to any type of substituted service, it need only be "reasonably probable that the party whose property is placed in jeopardy will be apprised of the pendency of the action and will be afforded a reasonable opportunity to appear therein and make his defenses." *Jacobs v. Roberts*, 223 U.S. 261, 265-266 (1912). The Petitioners partially cite *Nations v. Johnson*, 65 U.S. 195 (24 How.) (1860). The correct and complete citation from *Nations*, however, supports the Appellee's position rather than that of the Appellants:

> Notice to the defendant *actual or constructive,* however, is essential to the jurisdiction of all courts, and it was held by this court, in *Webster v. Reid,* II How. 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entered. Numerous cases . . . assert the general rule that no man shall be condemned in his person or property without notice and an *opportunity* to make his defense.

Nations v. Johnson, 65 U.S. at 203. (emphasis supplied). The Supreme Court in *Nations* clearly countenanced constructive notice and recognized that it may be the only practicable notice. *Id.*

Home Port reinstituted its lawsuit against the Defendants within 180 days of the effective date of the Consent Order. Home Port had a right to rely upon the terms of the Consent Order in serving the reinstituted suit on Defendants' counsel and expect Defendants' counsel to accept service pursuant to the parties' agreement and Consent Order. The responsive pleadings did not raise any issue of defective service. Mr. Ruben and Mr. Allen were appropriately before the district court; the district court properly exercised personal jurisdiction upon them; and the appellate court appropriately affirmed the trial court rulings.

II. THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION IN REFUSING TO VACATE THE DEFAULT JUDGMENT PURSUANT TO EITHER RULE 60(b)(1) OR 60(b)(6); AND THE COURT OF APPEALS ACTED APPROPRIATELY AFFIRMING THE DISTRICT COURT.

A. There was no "excusable neglect" or "any other reason justifying relief" on the part of Mr. Ruben and Mr. Allen or their counsel.

While Rule 60(b) may be "a grant reservoir of equitable power to do justice in a particular case," *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981), the present matter is not such a case. The present situation is similar to *Coleman v. Frierson*, 607 F. Supp. 1566 (N.D. Ill. 1985), *aff'd in part and rev'd in part on other grounds*, 814 F.2d 1142 (7th Cir. 1987). In *Coleman*, the court found the movants were not entitled to relief under Rule 60(b)(6) where the defendants were not diligent and conscientious clients and had not been misled about the status of the litigation, although counsel might have been more diligent in communicating with them. *See also C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984) (whether alleged ground for relief is interpreted to be clause (1) or (6), district court did not abuse its discretion in refusing to vacate default judgment where, *inter alia*, there was nothing in record to indicate that they could not have spoken to their attorney more frequently had they wished to and any lack of cooperation could have been cured in this manner); *Gambocz v. Ellmyer*, 438 F.2d 915 (3d Cir. 1971); *Veechione v. Wohlgemuth*, 426 F. Supp. 1297 (E.D. Pa.), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (consent

decree will not be vacated under clause (6) on ground counsel not authorized to enter into it where defendant had fair chance to evaluate terms and was his responsibility to assure that proper authorization had issued); *R.C. Service, Inc. v. Kende Leasing Corp.*, 111 F.R.D. 428 (N.D. Ill. 1986) (even where failure to comply with court's discovery orders had been due to gross negligence of defendant's attorney, default judgment would not be set aside where defendant could not show he had been a conscientious client).

Mr. Harper attempted with diligence to notify the Defendants that the lawsuit had been reinstituted. Certified mail to the last known address of Mr. Ruben and Mr. Allen was returned. (App., p. 68). Telephone calls to Adventurent were unavailing. (App., pp. 4, 29). The Defendants' uncooperative behavior during the second phase of the litigation was consistent with their conduct during the pendency of the first action. The Plaintiff's counsel noted Mr. Harper's troubles with the recalcitrant Defendants with respect to the initial trial date as follows:

> The reason why the action was not brought to trial in November of last year, and I can understand Mike's [Harper] problems, he was having difficulty getting his clients here to participate in the trial.

(App., p. 70).

By May 13, 1989, Mr. Ruben had formally retained Mr. Chastain. *Id.* Mr. Chastain did not move to set aside the default until March 13, 1990. Given Mr. Ruben's awareness of the facts and circumstances giving rise to

the default judgment in the first place, one should reasonably expect greater diligence on his part. Moreover, the facts do not show "excusable" neglect by Mr. Ruben and Mr. Allen or their counsel. Under the circumstances of this case, Mr. Harper did all he could do to represent his evasive clients.

Almost four (4) years have now passed since Home Port attained its default judgment; and allowing these particular Defendants to further stretch finality of the judgment would not advance fairness, realism, and reasonableness in the application of Rule 60(b).

B. The errors or omissions of Defendants' counsel are not "any other reason justifying relief from" the default judgment pursuant to Fed.R.Civ.P. 60(b)(6).

The case law is clear that, in deciding whether a party has satisfied the standards of Rule 60(b)(6), a court may not consider mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud: the reasons justifying relief under clauses (1), (2) and (3) of the Rule. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988). Clause (6) does not provide a discretionary foundation from which to seek relief outside the one (1) year time limit imposed on clauses (1) through (3). *Ackerman v. United States*, 340 U.S. 193 (1950). Rule 60(b)(6) is confined to those situations where a party is confronted with "extraordinary circumstances" excusing failure to follow ordinary paths of appeal. *Klapprott v. United States*, 335 U.S. 601 (1949).

Rule 60(b)(6) should come into play only if the one (1) year time limitation has expired and the facts are so "extraordinary" as to bring them within the meaning of "any other reason justifying relief" not covered in clauses (1) through (5). Since Mr. Ruben filed his Rule 60(b) motion within one (1) year of entry of the default judgment, potential relief would be available only under Rule 60(b)(1). Conversely, because Mr. Allen filed his motion to vacate nearly eighteen (18) months after entry of the default judgment, his avenue of relief solely rests upon Rule 60(b)(6). Mr. Allen's Rule 60(b)(6) motion is a transparent attempt to circumvent the one (1) Year time limit prescribed by Rule 60(b)(1) which should be scrupulously observed. Rule 60(b)(6) only authorizes relief from entry of a judgment for any reason justifying relief *other* than those reasons set forth in the preceding five (5) clauses. *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894 (4th Cir. 1987).

C. The errors or omissions of Defendants' counsel are properly imputed to the Defendants.

The omissions and commissions of an attorney are to be regarded as the acts of the client he or she represents. If a third party has relied on those acts, particular injustice would be done to our judicial system if a client were allowed to repudiate an attorney-client relationship merely because the attorney has engaged in behavior that may have been detrimental to the client's interests. *Link v. Wabash R.R. Co.*, 370 U.S. at 633-634. The client may well have a valid grievance; however, the target of his or her

ire should not be the innocent third party, but rather his or her own attorney. *Id.*

Mr. Allen retained Mr. Harper on behalf of all the Defendants; and he agreed, with the other Defendants' apparent consent, to act with authority as their spokesman. (App., pp. 28, 29, 102). Indeed, Mr. Allen admitted transmitting information he received from Mr. Harper to Mr. Ruben. (App., p. 125). Mr. Ruben was aware of the fact Mr. Harper was representing him in the litigation. Mr. Ruben subsequently moved to California, but did not inform Mr. Harper of that fact.

Although it serves Mr. Ruben's present objective to swear blame solely should be pinned to Mr. Harper and Mr. Chastain, in his earlier opportunity through affidavit to explain apparently dilatory conduct and plainly unreasonable delays harming his rights, he did not utter one (1) peep of Mr. Chastain's gross inattentiveness as causing his problem until September 27, 1990. (App. pp. 136, 137). No complaints against Mr. Chastain from Mr. Ruben on March 14, 1990, or July 9, 1990. (App., pp. 108, 110).

Mr. Ruben's concern with his attorneys' competence surfaces apparently whenever he does not get what he wants in Court. The timing is suspect. Mr. Ruben and Mr. Allen should not now be allowed to claim that they bear no fault for what they perceive to be their attorneys' incompetence, negligence, or unethical behavior. *Douglas v. Kemp*, 721 F. Supp. 358 (D.D.C. 1989), *aff'd*, 906 F.2d 783 (D.C. Cir. 1990). Innocent third parties should not suffer for shortcomings of another party's attorney.

D. The Plaintiff will suffer unfair prejudice if the default judgment is vacated.

This suit was first filed in 1986, but was dismissed upon agreement of the parties. The lawsuit was reinstituted on May 4, 1988, in compliance with the terms of the Consent Order. Approximately six (6) years have passed since litigation began; and more than four (4) years have lapsed since this action was brought the second time. The district court's concern with "dulled memories" is valid. (App., pp. 23-25). In his affidavit of February 3, 1991, Mr. McEachern stated that Edward Willcox, III, former controller of Home Port, is no longer available. Mr. Willcox maintained all of Home Port's financial records and had numerous conversations with the Defendants during his employment with Home Port. Not only is Mr. Willcox no longer available, but the financial records and documents that were under his dominion are now also unavailable. (App., pp. 23-25, 140-142). If this default judgment is vacated, Home Port will be forced to litigate the matter without a key witness and absent crucial documents.

Given the circumstances of this case, even if relief were available under Rule 60(b)(6), the motions were not made within the "reasonable time" contemplated by the Rule. In *Park v. Lexington Ins. Co.*, 812 F.2d at 877, and *United States v. Moradi*, 673 F.2d 725, 728 (4th Cir. 1982), it is held that a movant under Rule 60(b) must act not only in a timely fashion but also must demonstrate a lack of prejudice to the non-movant. Although he knew of the alleged problems with the judgment within a matter of days of its entry, Mr. Ruben waited nearly one (1) year to

file his Rule 60(b) motion. On the other hand, because Mr. Allen waited more than one (1) year, he must rely upon Rule 60(b)(6), while the motion is more appropriately based on clause (1). In *Augusta Fiberglass*, the defendant filed his Rule 60(b) within two (2) weeks of entry of the judgment; and the prejudice to Home Port here is far greater than the loss of a "quick victory." *Id.* The Petitioners' citation of *Augusta* is inapposite and buttresses Home Port's position that unreasonable delay, inexcusable neglect, bad faith, and harsh prejudice hoisted upon the Plaintiff render Rule 60(b) no refuge for these particular Defendants.

CONCLUSION

Home Port would respectfully request that the Petitions attacking the rulings of the district court, affirmed by the appellate court refusing to vacate the default judgment, be denied.

Respectfully submitted,

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